

ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of

Rulemaking to Amend Parts 1, 2, 21, and 25  
of the Commission's Rules to Redesignate  
the 27.5-29.5 GHz Frequency Band, to  
Reallocate the 29.5-30.0 GHz Frequency Band,  
to Establish Rules and Policies for Local  
Multipoint Distribution Service and for  
Fixed Satellite Services

Petitions for Reconsideration of the  
Denial of Applications for Waiver of the  
Commission's Common Carrier Point-to-  
Point Microwave Radio Service Rules

Suite 12 Group Petition  
for Pioneer Preference

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Federal Communications Commission  
Office of Secretary

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COMMENTS OF WEBCEL COMMUNICATIONS ON  
FIFTH NOTICE OF PROPOSED RULEMAKING

WebCel Communications, Inc. ("WebCel"), by its attorneys, submits these comments in response to the Fifth Notice of Proposed Rulemaking ("*Fifth Notice*")<sup>1</sup> released by the Federal Communications Commission ("FCC" or "Commission") in the captioned proceeding.

Although the Commission is plainly correct that flexibility for geographic partitioning and spectrum disaggregation must be accorded to Local Multipoint Distribution Service ("LMDS") at

<sup>1</sup> Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Second Report and Order, Order on Reconsideration and Fifth Notice of Proposed Rulemaking, CC Docket No. 92-297 (released March 13, 1997) ("*Fifth Notice*" and "*Second Report and Order*").

least on par with other wireless services, there are two serious problems with the Commission's proposals in the *Fifth Notice*.

- Unrestricted partitioning and disaggregation of LMDS could wreak havoc with the Commission's already inadequate spectrum license administration, management and record-keeping resources; and
- LMDS partitioning and disaggregation eliminate any need for "in-region" participation in the LMDS auctions by incumbent local exchange carriers ("LECs") and cable companies, which are ineligible to hold LMDS licenses in BTAs that overlap their monopoly service territories.

WebCel proposes that the Commission fashion an alternative to its typical license administration rules for partitioned and disaggregated LMDS, under which the initial (or "prime") LMDS licensee, rather than the FCC, would have principal responsibility for spectrum license management. The Commission must also eliminate the rule, adopted without public comment in the *Second Report and Order*, that allows bidding by incumbent LECs and cable systems for in-region LMDS BTAs. These monopolists can acquire any permissible in-region LMDS spectrum in the aftermarket. Their participation in the "in-region" auctions would only sanction anticompetitive abuse of the auction process and defeat the efficiency of the LMDS auctions themselves.

## INTRODUCTION AND SUMMARY

In the *Fifth Notice*, the Commission solicits public comment on specific procedural, administrative and operational rules for geographic partitioning and spectrum disaggregation by LMDS licensees. Having concluded in the *Second Report and Order* that any holder of an LMDS license may partition or disaggregate portions of its authorization,<sup>2</sup> the Commission now

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<sup>2</sup> *Id.* ¶ 145.

inquires as to the appropriate service-specific rules that should govern partitioning and disaggregation of LMDS -- including license areas, minimum disaggregation standards, combined partitioning and disaggregation, construction requirements, license terms, and unjust enrichment rules for competitive bidding installment payments.

WebCel agrees with the Commission's tentative conclusion that affording LMDS licensees the flexibility to partition and disaggregate their spectrum will encourage more rapid deployment of LMDS services and allow market forces to determine the optimal size of geographic and spectral configurations for LMDS. In particular, the relatively small size of LMDS cells makes partitioning and disaggregation especially important for promoting geographically-limited LMDS services -- such as university campuses and industrial parks -- and encouraging "niche" uses of the broadband LMDS spectrum.<sup>3</sup> At the same time, unlimited partitioning and disaggregation, and specifically combined partitioning and disaggregation, could impose severe administrative and license record-keeping burdens on the Commission, because there could well be thousands of individually partitioned or disaggregated LMDS license holders in each BTA. Nationally, the volume of potential partitioned and disaggregated LMDS licenses is staggering. Instead of a limitation of spectrum flexibility for LMDS licensees, however, WebCel believes these practical considerations support a different Commission approach to administrative issues, one that places principal responsibility for license record-keeping on the initial LMDS licensee rather than the FCC.

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<sup>3</sup> *Id.*

Partitioning and disaggregation also have an impact on eligibility restrictions for LMDS licensees. WebCel urges the Commission to explicitly address the relationship between partitioning, disaggregation and the eligibility rules adopted in the *Second Report and Order* for limiting the ownership of LMDS licenses by incumbent local exchange carriers (“LECs”) and cable television systems.<sup>4</sup> If unlimited partitioning and disaggregation is permitted for LMDS, as the Commission proposes, there is no public policy justification for permitting entities that are precluded from holding LMDS licenses to participate in the LMDS competitive bidding auctions for BTAs that are within their monopoly service territories. “In-region” auction bidding by LECs and cable companies will permit anticompetitive abuse of the auction process, encourage evasion of the Commission’s eligibility rules, and bid up LMDS license prices to monopoly levels -- thereby pricing true competitors and new entrants out of the market and defeating the procompetitive function of LMDS as a source of new, facilities-based entry. Under the guise of an intent to partition their license(s) post-auction, LECs and cable companies will be able to make a mockery of the carefully crafted eligibility restriction.

Incumbent LECs and cable companies should not be permitted to bid for LMDS licenses that they are ineligible to hold. Because the Commission has not proposed any license transfer restrictions for LMDS, cable systems and LECs will be able to acquire any permitted LMDS spectrum in the aftermarket, with the price for such spectrum determined by the free operation of market forces. In contrast to the Commission’s proposal to allow LEC and cable system participation in the LMDS auctions subject to divestitures in a 90-day “cure” period, the clear

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<sup>4</sup> *Id.* ¶¶ 146-99.

benefit of this approach is that the initial auction price for LMDS spectrum will be set by the intrinsic market value of the spectrum, rather than the anticompetitive application of monopoly rents that the LMDS eligibility rules are designed to prevent. Simply put, allowing entities ineligible to *hold* LMDS licenses to *bid* for these licenses subject to later promised divestiture will only create distortions in the efficiency of the LMDS auctions by permitting incumbent monopolists to "game" the process in order to drive up license prices and delay potential competition.

## DISCUSSION

### **I. LICENSE ADMINISTRATION AND MANAGEMENT SHOULD BE THE RESPONSIBILITY OF THE "PRIME" LMDS LICENSEE, NOT THE COMMISSION, FOR PARTITIONED AND DISAGGREGATED LMDS SPECTRUM**

The Commission's conclusion that geographic partitioning and spectrum disaggregation should be permitted for LMDS is both correct and necessary. In the recently adopted *Partitioning and Disaggregation Report and Order*,<sup>5</sup> the Commission relaxed its partitioning and disaggregation rules for Broadband PCS in order to encourage (1) the creation of smaller service areas that could be licensed to small businesses, including those that lacked the resources to participate successfully in spectrum auctions, (2) allow later entrants into the telecommunications market to acquire post-auction Broadband PCS licenses, and (3) provide a funding source to enable licensees to build out their systems and provide the latest in technological enhancements to

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<sup>5</sup> *Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services*, Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-148, (released Dec. 20, 1996) ("*Partitioning and Disaggregation Report and Order*").

the public.<sup>6</sup> These conclusions are equally applicable to LMDS, where the absence of quantified construction requirements does not implicate the same concern about use of partitioning as a means of evading build-out rules that initially led the Commission to reject unrestricted partitioning and disaggregation for Broadband PCS.

Partitioning and disaggregation hold even more significant potential in LMDS for “creat[ing] additional opportunities for small businesses, niche services and rural wireless providers by reducing the amount of capital necessary to enter the business.”<sup>7</sup> In light of the large 1,150 MHz allocation for basic LMDS, along with the capability to provide telephone, data and video services using this new spectrum, there are a huge array of potential commercial applications for LMDS. While some licensees will choose to provide integrated services using the entire spectrum block across an entire BTA, it is clear that many licensees could commercialize part of LMDS spectrum using less than the full allocation, or design systems serving geographic areas smaller than the BTA-based LMDS license areas. For instance, fixed “wireless local loop” services, including Internet access services, could be supported using a disaggregated portion of the 1.15 GHz LMDS allocation in small geographic markets -- such as campuses, industrial parks, office complexes and the like. By permitting unlimited partitioning and disaggregation of LMDS licenses, the Commission can further encourage the entry of new and entrepreneurial providers into the LMDS market in a way that will speed the commercial availability of LMDS-based services to consumers.

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<sup>6</sup> *Partitioning and Disaggregation Report and Order* ¶ 5.

<sup>7</sup> *Id.* ¶ 6.

The partitioning and disaggregation rules adopted for Broadband PCS provide a useful model for LMDS. In general, WebCel believes that licensee flexibility with respect to partitioning and disaggregation should be the same for all wireless services, unless there are service-specific rules -- such as license transfer restrictions -- that justify special treatment for individual services. This sort of regulatory parity is necessary to ensure efficient and nondiscriminatory access to capital markets by wireless licensees and to avoid providing some wireless services with artificial economies stemming from differing degrees of geographic and spectral flexibility. Thus, WebCel concurs with the Commission's proposals in the *Fifth Notice* that:<sup>8</sup>

- Allow geographic partitioning of LMDS licenses along any service area defined by the parties.
- Permit "combined" partitioning and disaggregation for LMDS.
- Require LMDS partitionees to meet the same "substantial service" criteria as the original licensee, while permitting disaggregated LMDS licensees to choose whether one or both parties will be responsible for the substantial service showings.
- Limit parties obtaining partitioned or disaggregated LMDS licenses to license periods that match the remainder of the original licensee's 10-year term.
- Base eligibility for small business (or less than \$75 million business) installment payment plans and unjust enrichment rules for licensees that partition or disaggregate to larger business on proportional population and/or proportional bandwidth measurements, as applicable.

The Commission has asked whether there are "any technical or regulatory constraints to the LMDS service that would render any aspects of partitioning or disaggregation impractical or

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<sup>8</sup> *Fifth Notice* ¶¶ 412-23.

administratively burdensome.”<sup>9</sup> There are no technical or regulatory aspects of LMDS that would justify *less* partitioning and disaggregation flexibility for LMDS licensees than is available to other wireless telecommunications licensees. At the same time, some modifications to the rules adopted in the *Partitioning and Disaggregation Report and Order* are surely necessary in light of the unique characteristics of LMDS, in particular the unprecedented size of the LMDS spectrum allocation. For instance, if unrestricted “combined” partitioning and disaggregation is permitted, or if there is no minimum disaggregation standard for LMDS, there could well be hundreds or thousands of different LMDS licensees within any BTA, with corresponding administrative burdens on the Commission’s ability “to track disaggregated spectrum and review disaggregation proposals in an expeditious fashion.”<sup>10</sup> Yet the Commission should not expend its limited financial and managerial resources to handle this potential deluge of spectrum license records, especially as its present license administration capabilities may already be insufficient.<sup>11</sup>

WebCel believes it imperative that the Commission not set any *a priori* limits on the flexibility of LMDS licensees to partition or disaggregate their spectrum, despite the potential for administrative difficulties. Partitioning and disaggregation rules need to be consistent across services in order to promote competitive and capital market parity. Moreover, LMDS technology is still evolving, and it is not clear whether there is any technically valid standard that could be applied, today, for objectively measuring a minimum disaggregation requirement.

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<sup>9</sup> *Id.* ¶ 411.

<sup>10</sup> *Id.* ¶ 414.

<sup>11</sup> The controversy surrounding the Commission’s giveaway of spectrum in the Digital Electronic Messaging Service (“DEMS”) to Associated Group, Inc. has resulted, in part, from the Wireless Telecommunications Bureau’s inability to manage the Commission’s license-issuing responsibilities. Geographic partitioning and spectrum disaggregation on a large scale, as is possible with LMDS, will only aggravate these administrative difficulties.



However, there are at least three principal areas in which unrestricted partitioning and disaggregation for LMDS would present potential problems in license administration, if the burden for license management continued to fall principally on the Commission.

- First, if all partitioning and disaggregation transactions must be reviewed and approved in advance by the Commission, there is a real potential for delay in the commercialization of the LMDS service and thus for undermining the capital-raising functions supporting spectrum license flexibility.
- Second, if the Commission is responsible for maintaining the same license records for LMDS partitionees and disaggregated license holders as for initial LMDS licensees, the record-keeping and license-tracking requirements for LMDS could prove overwhelming.
- Third, if LMDS licensees are required to undertake frequency coordination without (as is now the case) any single entity serving as the "contact point" for frequency coordination purposes, the transaction costs associated with partitioning and disaggregation -- and the resulting multiple one-on-one coordination requirements -- may prove economically unreasonable, thereby deterring efficient use of the LMDS spectrum.

WebCel believes that the Commission should address these potential administrative nightmares by fashioning a new licensing approach for LMDS that recognizes the possibility for numerous partitioned and disaggregated LMDS licensees in any BTA. Instead of requiring all partitioning and disaggregation transactions to comply with the existing "partial assignment" license transfer procedures<sup>12</sup> -- under which each partitioning or disaggregation transaction is subject to separate filing, public notice, petition to deny and FCC approval requirements -- *the Commission instead should allow these transactions at any time upon notice to the Commission by the original LMDS licensee.* So long as the *original* LMDS licensee retains an ownership

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<sup>12</sup> See *Partitioning and Disaggregation Report and Order* ¶ 70; *Fifth Notice* ¶¶ 423-24.

interest in the license, forfeiture and post-transaction penalties should be sufficient remedies to control improper partitioning and disaggregation and to provide an incentive for compliance with the Commission rules, including “unjust enrichment” provisions. (In the event that a small business LMDS licensee partitions or disaggregates spectrum to another entity eligible for installment payment treatment, the Commission will have ample opportunity to review eligibility for small business treatment in the course of issuing new promissory notes and security instruments.)

Under this proposed model -- which would operate much like a landlord-tenant-subtenant relationship in commercial real estate -- the initial (or “prime”) LMDS licensee will have principal responsibility for ensuring compliance with Commission rules, maintaining records as to the spectrum allocated to and geographic areas served by LMDS providers in its BTA, and for engaging in frequency coordination among all holders of partitioned or disaggregated LMDS spectrum. The Commission could enhance regulatory accountability by requiring an annual report from each prime LMDS licensee notifying the Commission as to the identity, spectrum allocations and geographic areas served by all entities in the BTA that have received partitioned or disaggregated LMDS spectrum. Indeed, because ultimate regulatory responsibility accountability rest with the prime LMDS license holder, it would not be unreasonable to allow private contractual agreements to allocate regulatory risk and responsibilities between the principal licensee and holders of disaggregated or partitioned LMDS spectrum, with the Commission intervening only upon complaint or if it appears, from an annual report or otherwise, that partitioning and disaggregation transactions have been entered into in order to circumvent the Commission’s rules.

WebCel recognizes that this approach would reduce the “real-time” information available to the Commission by eliminating formal license assignment approval for partitioned and disaggregated LMDS spectrum. However, it is clear that there is an extraordinary potential for partitioning and disaggregation of LMDS to enhance entry opportunities and speed commercialization of a unique wireless service. Rather than limiting the spectrum flexibility of LMDS licensee because of “[t]he administrative burden of keeping track of such arrangements,” WebCel urges the Commission to explore new ways of license and frequency coordination in order to allow LMDS the same degree of partitioning and disaggregation flexibility accorded to other wireless services.<sup>13</sup>

## **II. UNRESTRICTED LMDS PARTITIONING AND DISAGGREGATION UNDERMINE ANY JUSTIFICATION FOR PERMITTING INELIGIBLE LECs AND CABLE SYSTEM TO PARTICIPATE IN THE LMDS AUCTIONS**

The *Second Report and Order* concludes that there is “no compelling public benefit to be achieved” by precluding incumbent LECs and cable systems -- who are ineligible to hold 1,150 MHz LMDS licenses in BTAs that overlap their service areas -- from “participating fully” in the auctions for this spectrum.<sup>14</sup> The Commission ruled, instead, that these monopoly providers should be allowed to bid at auction for LMDS spectrum if they come into compliance with the eligibility restrictions within 90 days from the final grant of an LMDS license.<sup>15</sup>

This decision -- which was never proposed in any public notice or comment phase of this proceeding -- has the potential to wreak havoc on LMDS licensing and strikes at the heart of the

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<sup>13</sup> *Partitioning and Disaggregation Report and Order* ¶ 53. LMDS may well be a perfect candidate for the spectrum clearinghouse and electronic database that the Commission declined to approve for Broadband PCS. *Id.* ¶¶ 89-91.

<sup>14</sup> *Second Report and Order* ¶ 193.

<sup>15</sup> *Id.* ¶ 194.

eligibility restrictions fashioned by the Commission for LMDS. Contrary to the findings of the *Second Report and Order*, allowing incumbent LECs and cable companies to participate in any or every LMDS BTA auction for the 1,150 MHz blocks in their monopoly regions *serves no public purpose whatsoever*. In imposing eligibility restrictions, the FCC found that an incumbent “would have a strong incentive to obtain an LMDS license in order to prevent a new entrant from obtaining the license [and] forestall market entry.”<sup>16</sup> This incentive will clearly be at work as much in the LMDS auctions as in the actual deployment of LMDS services. Thus, the Commission’s approval of a post-auction 90-day “cure” period will only support application of an incumbent’s market power to LEC and cable company bidding strategies, in turn putting the incumbent monopoly “in the driver’s seat” to manipulate the process, inflate the price of LMDS licensees, deter entry by potential competitors, and create additional hurdles to the already difficult task of capital-raising by smaller, entrepreneurial LMDS auction participants.<sup>17</sup> In particular, incumbent LECs and cable systems could:

- Bid on *any* BTA, even those which overlap their monopoly territories well in excess of the 10% threshold precluded by the Commission’s LMDS eligibility rules, under the guise of a commitment to later divestiture.
- Bid on “in-region” BTAs and file post-auction waiver applications designed to delay commercialization of LMDS in the same manner as the spectrum “warehousing” prohibited by the *Second Report and Order*.

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<sup>16</sup> *Id.* ¶ 162.

<sup>17</sup> “One of the most formidable barriers to [auction] participation is the difficulty [small] businesses face in raising sufficient capital to compete in the highly capital-intensive wireless communications business.” *Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Services Spectrum Cap*, Report and Order, 11 FCC Rcd. 7824, 7883 at ¶ 124 (1996) (“*Broadband PCS Second Report*”).

- Participate in LMDS auctions within their monopoly territories solely in order to drive-up prices above competitive levels and increase network capital costs for their LMDS competitors beyond economic feasibility.
- Win LMDS licenses in monopoly BTAs and partition or sell to affiliated or allied entities or other “friends” who do not present a risk of direct competition with core monopoly services.

The *Second Report and Order* recognizes, but does not deal with, the reality that incumbent LECs and cable companies will value LMDS spectrum differently from otherwise-applicable market values, because they “have the additional incentive to protect their market power and preserve a stream of future profits.”<sup>18</sup> This is a very serious problem, because such supra-competitive values will distort the LMDS auctions and raise the price for LMDS licenses above competitive economic levels. As the Commission concluded in the Broadband PCS proceeding:<sup>19</sup>

Economic theory teaches that auctions are won by the bidder who puts the highest value on the property being auctioned. The value of the PCS licenses to the incumbent providers would be their continued economic rents (profits in excess of economic costs), which could be higher than the anticipated profits of any new entrant into a more competitive market. Incumbent firms may thus be willing to pay even more for the chance to impede entry than for the chance to compete vigorously against new entrants.

It is this auction-distorting effect of LECs and cable companies that the Commission’s 90-day cure rule not only allows, but exacerbates. *First*, under the Commission’s approach an incumbent can easily price new entrants out of the auction room and later sell the spectrum to an entity that commits to use it to compete only for services the LEC or cable system does not provide. *Second*, nothing in the Commission’s present LMDS rules prevents a monopoly LEC or

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<sup>18</sup> *Second Report and Order* ¶ 171.

<sup>19</sup> *Broadband PCS Second Report* ¶ 99.

cable company from bidding up the price of LMDS spectrum, winning the auction and then failing to make the 90-day divestitures to comply with the eligibility restriction; default of the auction deposit is a small price to pay, particularly for monopolists with billions of dollars in financial assets, for delaying, obfuscating or outright stifling the licensing of LMDS competitors.

*Third*, the rules adopted by the Commission in fact do *not* require any final “cure” within 90 days, since an incumbent can merely transfer the LMDS license to a trustee if it “certifies” it has been unable to find a buyer (which will likely be impossible at the monopoly bid prices to be expected from incumbents), or file a sham application for a waiver.<sup>20</sup>

The Commission should re-examine its 90-day cure rule in light of the determination in the *Second Report and Order* to permit unrestricted partitioning and disaggregation by LMDS licensees. Coupled with the absence of any time-limited restriction against transfer of LMDS licenses (unlike the F Block PCS licenses, for instance), the availability of both partial and complete partitioning and disaggregation by LMDS auction winners is clearly adequate to support any legitimate entry strategies by LECs and cable companies. *Incumbents will have the same right as any other entity to acquire LMDS licenses in the post-auction spectrum aftermarket -- and can do so for the non-overlapping portions of their service areas that do not infringe on the Commission's eligibility restrictions.* Thus, denying incumbent LECs and cable companies the ability to participate in the LMDS auctions will impose no economic penalty on them and will realize the profound public benefit of ensuring that LMDS auction prices are not bid up to monopoly levels in order to price new entrants out of the market. In contrast, allowing ineligible

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<sup>20</sup> 47 C.F.R. § 101.1003(f)(1)(C). See *Second Report and Order*, Appendix A.

entities to bid for LMDS licenses subject to later divestiture will only create distortions in the efficiency of the LMDS auctions by permitting incumbent monopolists to "game" the process in order to drive up license prices and deter potential competition.

### CONCLUSION

While the Commission must allow unrestricted partitioning and disaggregation of LMDS licenses, it should (1) fashion license assignment rules that minimize record-keeping and administrative burdens by placing principal responsibility for license tracking on the "prime" LMDS licensee in each BTA, and (2) preclude participation by LECs and cable companies in the LMDS auctions for "in-region" BTAs, in which they are ineligible to hold an LMDS license.

Respectfully submitted,

By: 

Glenn B. Manishin  
Blumenfeld & Cohen - Technology Law Group  
1615 M Street, N.W. , Suite 700  
Washington, D.C. 20036  
202.955.6300  
202.955.6460 fax

Martin L. Stern  
Preston Gates Ellis & Rouvelas Meeds  
1735 New York Avenue, Suite 500  
Washington, D.C. 20006  
202.662.8468  
202.331-1024 fax

*Counsel for WebCel Communications, Inc.*

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